

MEMORANDUM OF LAW

DATE: May 25, 1989

TO: Wendy DeWitt, Housing Commission

FROM: City Attorney

SUBJECT: Public Housing - California Constitution
Article XXXIV - Davis v. City of Berkeley -
Public Housing Project CA16-PO63-047 (North
City West)

By memorandum dated May 16, 1989, you asked for our comments as to the effect of the California Supreme Court December 19, 1988, decision of Davis v. City of Berkeley. The court in that case determined that ballot language in the City of Berkeley authorizing the acquisition and development of public housing in that city did not meet the requirements of Article XXXIV of the California Constitution which reads in part as follows:

Sec. 1. Approval of electors; definitions

Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

The ballot language was as follows:

(a) Any public entity . . . shall be empowered to develop, construct, or acquire public housing for the purpose of renting such housing to low income or moderate income persons in the City of Berkeley, provided such development, construction or acquisition is

financed through local, state, federal or private sources, or any combination thereof

. . . ¶P σ (d) In no event shall any development, construction or acquisition of public housing, as defined and authorized herein, exceed 200 units.

The court held that the ballot language in that case was not

sufficiently specific to meet the constitutional requirements.

The City of San Diego, as well as numerous other California cities, has, as you know, used ballot language similar in substance to that used in the City of Berkeley case.

While the court held that the ballot language did not meet the specificity requirement of Article XXXIV, the court nevertheless refused to issue a writ of mandate requiring an additional submission of the project in question to the voters for approval. The court stated that:

To justify issuance of a writ, it is not sufficient for a plaintiff to establish that a defendant failed to perform his ministerial duties with respect to article XXXIV. Insofar as the proceeding is equitable in nature . . . we must additionally consider the equities involved in granting the requested relief. 'The writ of mandate will not issue where it will work injustice, or introduce confusion and disorder, or operate harshly, or where it will not promote substantial justice.' . . . If we were to compel Berkeley to submit the virtually completed housing project to its electorate for referendum review at this late date, the writ would operate in a manifestly harsh and disorderly fashion, threatening the possible abandonment or destruction of a multimillion dollar public asset.

In addition, the court, in its decision, cited the legislative "validation procedures" enacted in 1976 and codified in Health and Safety Code sections 36000 through 36005.

With respect to projects initiated after that date, section 36005 provides:

No judicial action attacking or otherwise questioning the validity of the action of a local public entity in giving final approval to a proposal or application which may result in housing assistance . . . without obtaining prior approval pursuant to Article XXXIV . . . shall be brought prior to the adoption of a resolution or ordinance by the legislative body of the local public entity approving the proposal or application, nor may such action be brought at any time after 60 days from the date of adoption of the

ordinance or resolution approving the proposal.

Your May 16, 1989, memorandum pertains specifically to your proposed submission to HUD for Public Housing Project CA16-PO63-047 (North City West). You indicated as follows:

This 47-unit new construction Public Housing project is in process at the Housing Commission. It is now at the Proposal Submission stage, the first processing stage with HUD following grant allocation.

To date, the following actions have been taken:

Submission of Application to HUD June 29, 1988

Housing Authority Approval of Appl. July 5, 1988

HUD Approval of Application Sept. 23, 1988

Purchase of Proposed Housing Site,
12655 El Camino Real Nov. 2, 1988

Proposed Housing Site to be
Submit-ted to HUD (Proposal Submission) May 26, 1989

The total expenditures to date on the Project are:

Site Acquisition (local funds) \$1,850,000

Architectural and Consultant Costs
and Fees 23,350

TOTAL EXPENDITURES TO DATE \$1,873,350

There are several reasons to support the conclusion that the Housing Authority can proceed with the proposed project. First, substantial funds have, as indicated above, been spent in the furtherance of the project; second, the 60- day period specified in Health and Safety Code section 36005 will have run before the HUD funds being applied for are spent; and third, as described in the attached letter dated April 12, 1989, to HUD, the California Supreme Court has, on

its own motion, determined to rehear the Davis case which means that there is, at this time, no decision in the matter. A recent call to the Clerk of the California Supreme Court indicates that the actual rehearing date has not been set and that once the rehearing date has been set, there is no way of knowing when an actual decision will be forthcoming.

For the above three reasons, there is, in our opinion, no legal reason for basis to not proceed with the subject submission to HUD.

JOHN W. WITT, City Attorney

By

Harold O. Valderhaug
Deputy City Attorney

HOV:ps:559(x043.2)

Attachment

ML-89-52